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No. 2471

**United States Circuit Court of Appeals,
Ninth Circuit.**

OREGON-WASHINGTON RAILROAD AND NAVIGATION
COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI- gation Co., a Corporation, plaintiff in error,	}	No. .
<i>v.</i>		
THE UNITED STATES OF AMERICA, DE- fendant in error.	}	

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was instituted for violation of order made June 28, 1911, by the Interstate Commerce Commission requiring monthly reports of carriers in all instances where employees subject to the hours of service act have been on duty for a longer period than that provided in said act. The authority for said order is to be found in the amendment to section 20 of the act to regulate commerce made by section 14 of chapter 309 of the act of 1910 (36 Stat. L., 539, 556), as follows:

The Commission shall also have the authority by general or special order to require said carriers or any of them to file periodical

or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed, or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission shall require; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeiture last above provided.

This case is brought as an action for debt in 30 counts and is based upon the alleged failure of the defendant for 30 days to report to the Interstate Commerce Commission certain instances wherein employees in its service were on duty for longer periods than those permitted by the hours-of-service act.

The answer of the defendant admitted its interstate character and also that it had omitted to report the particular instances of excess service set forth in the declaration. The essential facts were submitted in a stipulation wherein a jury was waived and the case was tried by the court.

As to counts 1 to 15, inclusive, the stipulation admitted that the defendant, on May 1 to 3, 5 to 10, and 12 to 17, all inclusive, had failed to report to the Interstate Commerce Commission, as required by its order of June 28, 1911, the fact that on March 27, 1913, an operator in its service, to wit, one B. G.

Bishop, had remained on duty from 7.30 a. m. until 11.15 p. m.

As to counts 16 to 30, inclusive, the stipulation admitted the failure of the defendant to report, as aforesaid, on July 1 to 3, 5, 7 to 12, 14 to 18 the fact that on May 23, 1913, the said B. G. Bishop had remained on duty from 6.30 a. m. until 8.05 p. m.

There was introduced, over defendant's objection and exception, certified copies of the reports submitted by the defendant to the Interstate Commerce Commission, purporting to show and comprehend all instances wherein employees, during the months of March and May, 1913, had been on duty longer than the statutory periods; together with two supplemental reports covering the instances of excess service here involved, both of which were shown in the certificate to have been received at the office of the Commission on September 2, 1913, subsequent to the period here in issue. The stipulation admitted that no report of these instances had been made by or in behalf of the carrier before September 2, 1913. A deposition of Charles H. Bates, an attorney of Washington, D. C., was introduced by defendant to the effect that he was, and had been since February 16, 1911, the representative of the defendant at Washington, D. C., upon whom all orders issued by the Interstate Commerce Commission, applying to or affecting the defendant herein, had been served; that the order of the Commission dated June 28,

1911, here involved, had been served upon him and by him submitted to the Oregon-Washington Railroad & Navigation Co.; but that with said order as so served no forms were attached. The order of the Interstate Commerce Commission requiring monthly reports of carriers appears in full on pages 23 and 24 of the record.

The case stands solely on the stipulation printed in full in record, pages 7-8 and 17, 18, and 19, and the deposition of Charles H. Bates, record, pages 20, 21, and 22.

It was admitted that the forms used in making reports to the Interstate Commerce Commission were identical in form with those prescribed in the Commission's order of June 28, 1911.

The defendant at the trial relied entirely upon the alleged insufficiency of the service of this order, and moved the court to enter judgment for the defendant. This motion was denied, and defendant duly excepted thereto.

Judgment was entered for the plaintiff.

QUESTIONS INVOLVED.

- I. Does the fact that the Government was unable to show that when the order requiring monthly reports was served on this carrier's agent the established forms upon which such reports were to be made were also served, constitute a defense to such carrier when sued for failure to include in reports actually made upon such forms specific cases of excess service of railroad employees?
- II. Was it error to admit in evidence certified copies of reports made by this carrier to the Interstate Commerce Commission for the purpose of showing

the omission therefrom of certain particular cases of excess service of employees?

ARGUMENT.

Although the learned judge of the district court in the course of his opinion says that the names of employees specified in the complaint were omitted by "inadvertence" or "mistake," the stipulation (Rec., p. 28) on which the case was tried gives no reason, cause, or excuse for the nonappearance of these names in the report made to the Interstate Commerce Commission.

So all argument upon the basis of accident, inadvertence, or mistake in the making of the report is excluded from consideration here.

An examination of the record shows that the sole defense interposed, as stated by the judge of the district court (Rec., p. 13), "that a copy of the forms was not served upon the company together with the order as required by law and by the order of the Commission." (Order of Interstate Commerce Commission, June 28, 1911.)

It was conceded at the trial in the district court that reports which the plaintiff in error *did* file for the months in question in this action "were identical *forms* of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission on June 28, 1911." (Rec., p. 19.) (Our italics.)

The forms in question were prepared by the Interstate Commerce Commission, and forms iden-

tical therewith were in use by this carrier for the purposes prescribed in the Commission's order.

The furnishing of forms for the transmission of reports seems to be complete when such forms are found in the possession of the carrier and are in use by it for the prescribed purpose.

Service of the order is admitted. The order refers to accompanying forms, and forms identical in character with the prescribed "accompanying forms" are in use by this carrier.

That no formal service of accompanying forms may now be possible of proof seems to be no defense for omissions in reports made by the carrier upon the identical forms established by the Commission's order.

As this is a highly technical defense it may not be out of place to say that it would seem as if the fact was not proved that no forms *accompanied* the order when service was made on Mr. Bates merely by his declaration (Rec., p. 22) that no forms or papers of any kind were "*attached* to said order."

Non constat, because no forms were *attached* to the order, that such forms did not *accompany* the order.

Whatever probative force may or may not be given to Mr. Bates's deposition, it is clear that a legal order of the Interstate Commerce Commission was served upon him which referred to accompanying forms and that such forms are in use by this carrier.

When in the exercise of power properly delegated to the Interstate Commerce Commission an order is issued by that Commission requiring reports and establishing forms therefor no service of such order or forms is an essential to the vitality of such order. The courts take judicial notice of such regulations when officially made and promulgated, and those whose conduct is affected by such orders are bound to obey the same without proof of actual notice of such regulations.

Regulations of the Post Office, the Interior, and the War Departments are familiar examples of this rule. (*Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S., 194, and cases therein cited.)

The method of promulgation is directory and not mandatory.

But in this case there is not only notice and knowledge on the part of the carrier of the forms and the identical tenor thereof, but there is use made of them by the carrier in attempted compliance therewith.

II.

Certified copies of the carrier's reports were admissible.

By section 16 of the act to regulate commerce these reports are public records and copies certified by the secretary under the Commission's seal shall be received in evidence with like effect as the originals.

But even if this were not the clear rule of law, there was no prejudice to the interests of the car-

rier from the introduction of these certified copies of its reports for the reason that the only relevant evidence deducible therefrom was also clearly before the court in the stipulation of both parties.

III.

Carrier's motion for judgment was properly overruled.

The stipulations in the case established all the essential elements of a case for the plaintiff. There was no conflict of evidence and no contradiction of fact. As far as the stipulation goes there was nothing disputed.

Summarizing the facts of the stipulation there was undisputed proof of—

1. Excess service of specified employees engaged in interstate commerce on a railroad engaged in interstate commerce.

2. Omission of the names of such specified employees from the monthly reports which the carrier was required by law to make to the Interstate Commerce Commission.

No element necessary to make out a case is wanting and there was no error in the direction of a verdict for the Government on all counts of the complaint.

Respectfully submitted.

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